In the Supreme Court of the United States

OCTOBER TERM, 1946.

No. 448.

IN THE MATTER OF
VAN SWERINGEN CORPORATION,
Debtor,
and
THE CLEVELAND TERMINALS BUILDING COMPANY,
Subsidiary Debtor.

THE CLEVELAND HOTEL PROTECTIVE COMMITTEE,
J. C. LINCOLN, GORDON MACKLIN, ROBERT H. JAMISON,
MELVIN B. HOTT AND ROY BRENHOLTS,
Individually and as Members of said Committee,
and
THE HENRY GEORGE SCHOOL OF SOCIAL SCIENCE,
Intervening Petitioners,
Petitioners,

vs.

THE NATIONAL CITY BANK OF CLEVELAND,
Successor Trustee,
and
THE CLEVELAND TERMINALS BUILDING COMPANY,
Respondents.

IN PROCEEDINGS FOR THE REORGANIZATION
OF A CORPORATION.

ON PETITION FOR WRIT OF CERTIORARI,
TO THE UNITED STATES CIRCUIT COURT OF APPEALS,
FOR THE SIXTH CIRCUIT.

BRIEF FOR RESPONDENT, THE NATIONAL CITY BANK OF CLEVELAND, SUCCESSOR TRUSTEE, OPPOSING PETITION FOR WRIT OF CERTIORARI.

(Names of Counsel on inside of Cover.)

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JOHN T. SCOTT,
BROOKS W. MACCRACKEN,
Union Commerce Bldg., Cleveland, Ohio,
Attorneys for Respondent,
The National City Bank of Cleveland,
Successor Trustee.

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STATEMENT OF THE CASE.

The Proceedings.

The petition for writ of certiorari filed herein is filed under Section 240 of the Judicial Code (28 U. S. C. 347 (a)).

It seeks a review of the judgment entered on May 31, 1946, by the United States Circuit Court of Appeals for the Sixth Circuit, which judgment affirmed the order of the District Court of the United States for the Northern District of Ohio which found that the so-called Cleveland Hotel Plan was fair and equitable and feasible, and confirmed said Plan, and ordered it to be consummated as of July 1, 1942.

The Cleveland Hotel Plan was proposed in the proceedings for reorganization, under Section 77B and Chapter X of the Federal Bankruptcy Act, of Van Sweringen Corporation, debtor, and The Cleveland Terminals Building Company, subsidiary debtor, which proceedings were begun by appropriate petitions of the debtor and the subsidiary debtor filed in the District Court in October, 1936. The Cleveland Hotel Plan was subject to the provisions of the subsidiary debtor's General Plan of Reorganization, so far as relevant. As to the assets and liabilities of the subsidiary debtor unconnected with the Cleveland Hotel (and they were many) said General Plan has already been consummated.

The General Situation Involved.

The Cleveland Terminals Building Company (hereinafter sometimes referred to as the "Building Company") holds, as lessee, a ninety-nine year renewable lease on the Cleveland Hotel. The lessor under this lease is now The National City Bank of Cleveland, as successor trustee under an Agreement and Declaration of Trust, dated April 1, 1927. The Guardian Trust Company was the original trustee under said Declaration of Trust.[1] The National City Bank

[1] See Agreement and Declaration of Trust, April 1, 1927 (R. 102).

of Cleveland succeeded to the trusteeship in March, 1935, after the failure of The Guardian Trust Company (R. 550). Said successor trustee is hereinafter sometimes referred to as the "Trustee."

In April, 1927, The Guardian Trust Company, having acquired a title to the Cleveland Hotel property, executed an Agreement and Declaration of Trust, dated April 1, 1927 (R. 102), declaring itself trustee of said property for the holders of so-called fee ownership certificates to be issued under said Declaration of Trust. The Declaration of Trust divided the trust estate into seven thousand indivisible equal interests, and the fee ownership certificates issued under the Declaration of Trust each represent one or more of those equal interests. These interests were originally sold to the public at about $500.00 per interest.

The Guardian Trust Company, as trustee as aforesaid, and as owner of the Cleveland Hotel property, leased said Cleveland Hotel property to The Cleveland Terminals Building Company under a ninety-nine year lease, renewable forever, likewise dated April 1, 1927.[2] Under the 1927 lease the Building Company was required to pay a fixed rent of $192,500.00 per year, payable in quarterly installments of $48,125.00 each. This rent (hereinafter referred to as the "fixed rent") amounted to $27.50 per year on each one seven thousandths interest in the Cleveland Hotel property (or 5½% on the original sale price of each such interest).

In 1932 the fixed rent obligations of the 1927 lease were modified by two Supplements to and Modifications of Lease (Physical I. P. Exhibits 3B and 3C; and R. 724) so as to postpone until July 1, 1942, the due date of the fixed rent for the period from April 1, 1932, to June 30, 1937, but also so as to require the Building Company to pay to the trustee-lessor in cash monthly, against said fixed rent, all of the

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[2] See Indenture of Lease, April 1, 1927 (Physical I. P. Exhibit 3).

net earnings of the leased premises available in cash until the amount of the fixed rent so postponed had been paid in full with interest at the rate of 5½% per annum. The 1932 modifications also required the Building Company to execute and deliver to the trustee-lessor an equipment lease and a chattel mortgage on all of the Cleveland Hotel furniture and equipment, each in effect securing the payment of the postponed rent. The equipment lease and the chattel mortgage so required were duly executed by the Building Company. Other requirements of the 1927 lease were not affected by the 1932 modifications.

In October, 1936, the Building Company filed its petition for reorganization in these proceedings. Thereupon, the Trustee filed with the Special Master in the reorganization proceedings its proof of claim against the Building Company for rent and other unpaid obligations accrued to October 13, 1936, with interest thereon to that date (R. 94). This claim was subsequently allowed as of October 13, 1936, for an aggregate amount of $897,562.59, and was classified, in its own class, as secured by the instruments of lease and chattel mortgage above-mentioned (R. 100). The value of said security was not then determined, but, subsequently, in October, 1943, the Special Master determined the value of said security at that time to be $508,473.98 (R. 49).

The Parties Here.

The petitioners are the owners and the representatives of owners of a small minority of interests evidenced by certain of the so-called fee ownership certificates issued under the Declaration of Trust, dated April 1, 1927.[3] The respondents are the Trustee and the Building Company, the subsidiary debtor.

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[3] The representation of the petitioners is 692 interests at the outside. Of these, not more than 188 interests were acquired by the petitioners, and those represented by them, prior to the reorganization proceedings. This is about 2.7% of the 7,000 interests outstanding.

The Cleveland Hotel Plan.

The statement of the "substance" of the Cleveland Hotel Plan in Petitioners' Brief, pages 11-12, is incomplete in many respects and inaccurate in others.

Disregarding provisions thereof which do not appear to be involved here, the Cleveland Hotel Plan (R. 128-151) proposes generally as follows:

1. A new corporation shall be organized, to which will be transferred, free and clear of all claims and liens except those of the Trustee, the Building Company's lease and leasehold of the Cleveland Hotel and all property of every kind and description incident to or growing out of the operation of the Cleveland Hotel (R. 129). This includes the property covered by the aforementioned equipment lease and chattel mortgage, and also property which has been found to be free and unpledged and to have a value in the amount of $138,908.57 (R. 49-50).

2. The Cleveland Hotel lease shall be modified as follows:

(a) The fixed quarterly rent (to be distributed to certificate holders) shall equal 1¼% of the product arrived at by multiplying $500.00 by the number of publicly held interests at the time of the particular payment (R. 136). This amounts to $175,000.00 per year so long as the 7,000 publicly held interests now outstanding remain outstanding. Publicly held interests are those which shall not have been purchased by the Trustee under (c) below (R. 143).

(b) There shall also be paid, annually, as additional rent (to be distributed to certificate holders) a sum equal to the amount arrived at by multiplying one-half of the net earnings (as defined in the Plan) of the Cleveland Hotel by the number of publicly held interests and dividing that result by 7,000; provided that if such amount is less than ½% of the product arrived at by multiplying $500.00 by the number of publicly held interests, the sum to be paid shall be increased to said ½%, to the extent that one-half of said

net earnings will permit; and provided, further, that commencing in 1957 the sum to be paid shall never be less than said ½% (R. 137).

(c) The balance of the net earnings of the Cleveland Hotel shall be paid, annually, to the Trustee, not as rent but to be used by the Trustee for the purchase of publicly held interests either on proffer from such holders as may be willing to sell the same at less than $505.00 per interest, or by lot at $505.00 per interest (R. 138); provided that when the number of publicly held interests has been reduced from 7,000 to 3,500 or less, the sum required to be so paid to the Trustee shall be reduced by a sum equal to one-half of the net earnings of the Cleveland Hotel (R. 139). Beginning with the year 1946, however, the sum required to be so paid to the Trustee shall be not less than certain minima set forth in the Plan (R. 140).

(d) The aforesaid payments of fixed rent, together with the aforesaid payments on account of net earnings, shall never be less than $175,000.00 in respect of any calendar year (R. 140).

(e) "Net earnings" are particularly defined, and management compensation deductible in arriving at net earnings is strictly limited (R. 142).

(f) Provisions with respect to the payment of underlying ground rent ($15,000.00 per year) and expenses, including the compensation of the Trustee, shall correspond to the provisions of the existing lease (R. 136, 138). But the provisions of the existing lease for payments into a depreciation fund shall be eliminated (R. 144).

(g) In the event that the lease, as modified by the Plan, is terminated on account of default of the lessee, the liquidated damages of the Trustee as lessor shall be fixed at $570,000.00 (R. 144).

(h) To further secure the performance by the lessee of each and every covenant and agreement of the lessee in the lease, as modified by the Plan, and to secure the payment of the liquidated damages aforementioned, (1) the lessee shall give to the Trustee a chattel mortgage on all of the furniture, furnishings,

equipment and trade and tenant fixtures of the Cleveland Hotel, and shall keep the same insured up to 90% of the full insurable value thereof, and (2) until the publicly held interests have been reduced from 7,000 to 3,500, the lessee shall also pledge or cause to be pledged with the Trustee all of the lessee's (the new corporation's) capital stock and all dividends and distributions thereon (R. 144-146).

3. The new corporation shall assume all debts and obligations arising out of the operation of the Cleveland Hotel, and shall also assume all the obligations of the Cleveland Hotel lease, as modified by the Plan, except the accrued and unpaid rent (as defined in the Plan) as of the day the Plan is consummated (R. 129). This accrued and unpaid rent amounts to $1,109,904.31 as of July 1, 1942 (R. 89).

4. As to the claim of the Trustee for accrued and unpaid rent, the Trustee shall receive the same relative distribution as general creditors of the Building Company receive on their allowed claims (R. 150). This consists of a cash distribution and one-tenth of a share of stock of the reorganized Building Company for each $81.44 of allowed claim. (See Article VII of the Building Company's General Plan of Reorganization referred to, *infra*.)

5. The Building Company (the subsidiary debtor) shall be released from all obligations under the Cleveland Hotel lease (R. 130).

The Cleveland Hotel Plan is subject to the provisions, so far as relevant, of the Building Company's General Plan of Reorganization,[4] and in said General Plan of Reorganization, it is provided in Article VIII, Section VIII, sub-

[4] See Amended Plan of Reorganization, being changes and modifications dated October 1, 1940, of Plan of Reorganization of Van Sweringen Corporation and The Cleveland Terminals Building Company dated May 18, 1937, as heretofore amended, insofar as the same deals with the assets and liabilities of The Cleveland Terminals Building Company, and with certain assets and liabilities of Van Sweringen Corporation (an unnumbered Physical Exhibit, being a printed booklet of 98 pages).

section 5, that in the event of the failure of any class of secured claimants to accept the Plan, then (unnumbered physical exhibit, page 46)

> "In case the holder or holders of any such secured claim shall also sustain the relation of landlord to The Cleveland Terminals Building Company, then The Cleveland Terminals Building Company may, under appropriate orders of the Court, reject the lease involved in such relation * * *."

The Cleveland Hotel Plan provided (R. 130) that it should become effective when the Trustee determined that three-fourths in interest of the certificate holders had consented to and approved the Plan; and the Trustee did not accept the Plan until it had the required consents and approvals of the certificate holders.[5] The Trustee accepted the Plan on June 29, 1942.

The certificate holders' consents to and approvals of the Cleveland Hotel Plan were given as beneficiaries under the Declaration of Trust, dated April 1, 1927, and not as creditors of the Building Company. (The Declaration of Trust provides that it may be amended by the consent of the Trustee and three-fourths in interest of the certificate holders.) The Trustee was a creditor of the Building Company, but the certificate holders were not creditors of that company.

The Declaration of Trust.

In the Declaration of Trust, dated April 1, 1927 (I. P. Exhibit 2; R. 102), under which the Trustee is acting, it is provided that (Article V; R. 116):

> "In the event that the Lessee shall make default in any of the provisions of the Lease * * * then the Trustee

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[5] In the courts below the petitioners contended that the Trustee did not have the required consents and approvals of the certificate holders. The courts below decided this issue against the petitioners and it is not involved here. (See Petitioners' Brief, page 7.)

shall have full authority to terminate the Lease * * *, and in such case *or in any other contingency* to take such other action with respect to the Lease or Trust Estate as it shall deem advisable, without reference to the Beneficiaries and as if it were the sole legal and equitable owner thereof * * *." (Italics ours.)

Other Facts.

A few other detailed facts will be stated in the argument, *infra*, insofar as they seem relevant to the discussion there.

ARGUMENT.

The Opinion Below.

The opinion of the Circuit Court of Appeals is reported in 155 F. (2d) 1009, and is found in the Record at pages 829 to 839. It meets every argument of the petitioners here, and, we submit, is completely sound in its conclusions.

The Cleveland Hotel Plan.

1.

The Cleveland Hotel Plan gives to the Trustee the alternative of taking a rejection of its existing lease with all the consequences incident to such rejection, or of accepting a modified lease on the terms proposed in the Plan. Since, under the Plan, the Trustee could have its strict legal rights, as upon rejection, if it wanted them, the Plan conforms to the principles of the Milwaukee case, and is not in conflict with the principles of the Los Angeles case.

The petitioners bottom their argument in their attack upon the Cleveland Hotel Plan on *Case v. Los Angeles Lumber Products Company, Ltd.*, 308 U. S. 106; 84 L. ed. 110. In the *Los Angeles* case the debtor company had assets valued at about $850,000, and a mortgage debt of some $3,800,000. The plan of reorganization provided that the

assets would be transferred to a new company, the mortgage cancelled and the bondholders given, in place of their bonds, 5% non-cumulative preferred stock, while the so-called Class A stockholders of the old insolvent company would receive all of the common stock of the new company without the payment of any assessment or subscription. In holding the plan unfair, this court reiterated the principle that "to the extent of their debts, creditors are entitled to priority over stockholders against all the property of an insolvent corporation"; and the court found that the stockholders were furnishing no sufficient consideration for their stock in the reorganized company.

The *Los Angeles* case is clearly different from the case at bar. It involved an adjustment of the relations between creditors and shareholders of an insolvent corporation. The present case, as the courts below agreed, "is not a case of stockholder retention of interest, to the detriment of bondholders" (R. 82; 835). Here, we are concerned with an adjustment of the rights of a lessor and a lessee, and the modification of an existing lease. This distinction was recognized by this court in *Group of Institutional Investors v. Chicago, M. St. P. & P. R. Co.*, 318 U. S. 523; 87 L. ed. 959. That case involved the plan of reorganization of the Chicago, Milwaukee, St. Paul & Pacific Railroad Company, and one of the issues concerned that company's lease of the properties of the Chicago, Terre Haute & Southeastern R. Co. The Terre Haute had outstanding four bond issues secured by liens on lines and trackage rights in Indiana and Illinois and carrying 4% and 5% interest. The Milwaukee operated the lines of the Terre Haute under a lease, by which the Milwaukee agreed to pay the Terre Haute's expenses, and to meet the interest and principal obligations on the Terre Haute bonds as they became due. The Milwaukee met all interest payments, but it defaulted in the payment of the principal obligations on one of the Terre Haute bond issues and failed to maintain the equipment to

full extent of its undertaking. The Milwaukee plan of rganization provided (see 318 U. S. 532-534) for the cution of a new lease between the Terre Haute and the rganized Milwaukee on condition that sustantially all Terre Haute bondholders agree to an extension of the turity of their bonds and a reduction in the fixed interest charges, and waive the equipment failures. Under new lease, the lessee would assume the payment of the ncipal of, and the interest on, the modified bonds and also corporate expenses of the Terre Haute. This plan was acked by certain Terre Haute bondholders as unfair and quitable (citing the *Los Angeles* case), on the ground it the modifications proposed for the four classes of rre Haute bondholders were to be made "regardless of lien, security, interest or maturity of each and the earn- power of the respective underlying properties." (See 8 U. S. 546.) This court denied the contention of the rre Haute bondholders, and said, 318 U. S. 546-547):

> "• • • The short answer to that objection is that the Terre Haute properties have not been treated by the Commission or the District Court as a part of the properties of the debtor for reorganization purposes. Nor has any question been raised or argued here as to the power of the Commission or the District Court so to treat them. The Commission and the District Court considered the problem solely as one of rejection or affirmance of a lease. The Terre Haute bondholders were in effect given the option to take the Terre Haute lines back or to agree to a reduced rental. If the Commission had authority to determine the question of rejection in the manner indicated and if it complied with the legal requirements for the exercise of that authority, the modifications which it proposed and which the District Court approved are valid. We think they are."

other words, the court held that since the lessor was en the option of accepting a rejection of the Terre Haute se and taking back the leased properties, the lease

modifications proposed by the lessee in the alternative were valid even though they disregarded the priorities then existing between the several classes of bondholders of the lessor.

A similar issue was involved and decided in like manner by the Circuit Court of Appeals for the Second Circuit in *In re New York, New Haven & Hartford R. Co.*, 147 F. (2d) 40, 51 (certiorari denied, 325 U. S. 884; rehearing denied, 325 U. S. [No. 2] xviii). The court in that case considered the objections of bondholders of the Boston Terminal Company to the plan of reorganization of the New Haven railroad. The Terminal Company was a Massachusetts corporation created by a special act of the Massachusetts legislature, which act required the New Haven railroad, among others, to use the terminal of the Terminal Company and to pay the Terminal Company for such use a percentage of the charges and expenses of the Terminal Company, including the interest on its outstanding bonds. The bondholders of the Terminal Company objected to that part of the plan of reorganization of the New Haven railroad which purported to relieve the New Haven railroad from the statutory obligation to use the terminal of the Terminal Company and which reduced, retroactively to 1939, the compensation to be paid for such use since 1939 and in the future. In affirming the action of the District Court dismissing the objections of bondholders of the Terminal Company, and approving the plan in the respect in question, the Circuit Court of Appeals said (pages 51-52):

> "• • • The provisions were correctly construed by the district judge to constitute an offer of a revised arrangement which the Terminal Company is free to accept or reject after submission of the offer to it. If it accepts, it waives any claim for greater compensation; if it rejects, it may claim as an administrative expense compensation for use of the property by the reorganization trustees during these proceed-

ings and may file a claim for any damages to which it may be entitled by reason of abrogation of the statutory obligations for the future.

"* * * The plan enables New Haven to reject what in effect amounts to a burdensome lease. The plan, however, does not compel Boston Terminal to furnish the service at the rental offered; if Boston Terminal does not choose to accept the offer, it can, as a creditor, file proof of claim against New Haven for any damages to which it may be entitled. * * *.

"* * * Hence the amount of the offer is a matter of business judgment to be considered from the standpoint of New Haven's interests rather than a statutory requirement that assets of a debtor to be organized in these proceedings be valued by the Commission. See *Group of Institutional Investors v. Chicago, M., St. P. & P. R. Co.*, 318 U. S. at page 550, 63 S. Ct. at page 742, 87 L. Ed. 959."

Similarly, the Cleveland Hotel Plan is an alternative to rejection of the Cleveland Hotel lease by the Building Company. The alternative of rejection of the hotel lease is provided for in Article VIII, Section VIII, subsection 5, of the General Plan of Reorganization of the Building Company, which stipulates that in the event of the failure of any class of secured claimants to accept the Plan, then (unnumbered physical exhibit, page 46)

"In case the holder or holders of any such secured claim shall also sustain the relation of landlord to The Cleveland Terminals Building Company, then The Cleveland Terminals Building Company may, under appropriate orders of the Court, reject the lease involved in such relation * * *."

As pointed out in the *Milwaukee* case, the Cleveland Hotel Plan is not subject to the same rules as a plan which deals with the adjustment of relations between creditors and shareholders of an insolvent company. The Cleveland Hotel Plan gives to the Trustee the alternative of taking a rejection of its existing lease with all the consequences inci-

dent to such rejection, or of accepting a modified lease on the terms proposed in the Plan.[1] Under the *Milwaukee* and *New Haven* cases such alternative is free from attack, because the Trustee can have its strict legal rights, as upon rejection, if it wants them.

2.

The Cleveland Hotel Plan is fair and equitable, however, even under the principles of the Los Angeles case, since under the Plan the Trustee receives, through a new lease, a fair and equitable consideration for waiving its security for part of its back rent claim.

In approaching that proposition, it is desirable, in order that the court may follow easily the argument hereinafter made, to restate a few facts which have already been stated, *supra*.

The underlying title of the Cleveland Hotel is owned by The National City Bank of Cleveland, Trustee. It holds the underlying title for the use and benefit of the holders of certain so-called fee ownership certificates, which represent, in the aggregate, 7,000 interests. The underlying title of the Cleveland Hotel is subject to an indenture of lease, dated April 1, 1927, as subsequently modified, under which the Building Company, the subsidiary debtor, is lessee.

The Building Company is in default for back rent under said lease to the extent of approximately $1,100,000.00; and the Trustee has a claim against the Building Company for said back rent. This claim of the Trustee is secured by a chattel mortgage on certain furniture and equipment of the Building Company, valued at approximately $500,000.00. Realistically, therefore, about $600,-

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[1] The choice of the alternatives lies with the Trustee. It does not lie with the Building Company, the subsidiary debtor, which is the inference left by the first full paragraph on page 19 of Petitioners' Brief.

000.00 of the back rent claim of the Trustee is unsecured, and is entitled to no different treatment than the claims of other general creditors of the Building Company. Under the Cleveland Hotel Plan, however, the entire back rent claim of the Trustee is accorded the same treatment as unsecured claims against the Building Company generally.

The basic objection of the petitioners to the Cleveland Hotel Plan is based on this treatment of the Trustee's back rent claim. They argue that, by reason of this treatment, the Plan releases to the lessee the security now pledged to the Trustee, as lessor, against its back rent claim, and that, consequently, the Plan violates the principles of the *Los Angeles* case. The petitioners have variously phrased this alleged defect, but finally all of their objections come back to this one.

So far as we can find, there is nothing in the *Los Angeles* case or the other decisions of this court following it that requires that a reorganization plan sequester to each secured creditor the exact security held by such creditor. All that the authorities hold is that if a secured creditor's security is released to the debtor in a reorganization plan, then the secured creditor must be given in that plan a fair *quid pro quo* for the security so released. (See *Consolidated Rock Products Co. v. Du Bois*, 312 U. S. 510, 530; 85 L. ed. 982, 996.) In the last analysis, therefore, even if the principles of the *Los Angeles* case are applicable, the issue turns upon a judgment as to whether or not the Trustee, under the Cleveland Hotel Plan, receives a fair and equitable consideration for waiving its security on approximately $500,000.00 of its back rent claim. The Circuit Court of Appeals, the District Judge and the Special Master each found that the Trustee is receiving a fair and equitable consideration. We submit that it is. In any event said findings in that regard are conclusive here unless clearly erroneous.

Under the Cleveland Hotel Plan, for waiving its security on its back rent claim, the Trustee receives

1. A claim as an unsecured creditor for both the secured and unsecured portions of its back rent claim; and
2. A new, and, as the Trustee believes, very favorable lease on the Cleveland Hotel property, from a company which will put behind the new lease assets of more than $125,000.00, in or against which the Trustee now has no right or claim.

If the new lease which the Trustee will receive under the Cleveland Hotel Plan is a very favorable lease to the Trustee, then it seems perfectly clear that the Trustee is receiving a fair *quid pro quo* for waiving its security on its back rent claim, and that the Plan is good. We submit that the Trustee is receiving under the Plan not only a very favorable lease, but a lease far more favorable to it than it could otherwise hope to make on the Cleveland Hotel property.

It is not hard to demonstrate that this is so. Under the proposed new lease, the lessee thereunder agrees

1. To pay a fixed net rent at the rate of $25.00 per year for each interest outstanding at the time ($175,000.00 per year so long as the 7,000 interests now outstanding remain outstanding);
2. To pay annually additional rent at the rate of 1/7000th of one-half of the net earnings of the Cleveland Hotel for each interest at the time outstanding (each interest thus to receive by way of additional rent its ratable share of one-half of the hotel's net earnings); provided, however, that if the additional rent for any year calculated as aforesaid does not equal $2.50 per interest, then one-half of the net earnings of the Cleveland Hotel will be paid as additional rent in so far as it is required to provide additional rent of $2.50 per outstanding interest;[2] and, provided further, that commencing with the year 1956 this additional rent must always equal $2.50 per interest per year; and

[2] This provision becomes increasingly valuable as interests are retired.

3. To apply the entire balance of the net earnings of the Cleveland Hotel to the purchase or call of the outstanding interests until one-half of the presently outstanding 7,000 interests are retired. (Under the existing lease the lessee is not required to purchase any interests.)

The proposed new lease, under the Cleveland Hotel Plan, will contain an entirely new liquidated damage clause in the amount of $570,000.00,[3] and will be secured by a pledge of all of the Cleveland Hotel furniture and equipment, thus enabling the Trustee, without cash outlay, to take over the furniture and equipment if the lease ever goes into default. The proposed new lease will also be secured, until one-half of the presently outstanding interests are retired, by a pledge of all of the lessee's capital stock. For the further protection of the Trustee and the certificate holders, the lessee agrees, in the proposed new lease, that, until one-half of the presently outstanding interests are retired, it will not, without the consent of the Trustee, assign or mortgage the lease or sub-let the leased premises or engage in any business other than the operation of the Cleveland Hotel, and that all executive salaries and compensation for management in operating the hotel, howsoever paid, will not exceed in the aggregate 2% of the gross cash receipts of the hotel (R. 142).

From the foregoing, three things are perfectly manifest:

First: In addition to the fixed rent ($175,000.00 per year so long as the 7,000 interests now outstanding remain outstanding), the Trustee (and through it

[3] The amount of $570,000.00 is three years of the minimum annual payments required to be made by the lessee under the proposed lease on account of fixed rent and in respect of net earnings ($175,000.00 per year; R. 140), plus three years of underlying ground rent required to be paid by the lessee under the proposed lease ($15,000.00 per year; R. 136-137). See 11 U. S. C. 602. The liquidated damages provision in the proposed lease is perfectly good. See *Jones v. Stevens*, 112 O. S. 43.

the certificate holders) will receive an equitable participation in one-half of the net earnings of the Cleveland Hotel.

Second: All net earnings of the Cleveland Hotel not paid to the Trustee as additional rent will be devoted to the purchase or call and retirement of outstanding interests until one-half of the now outstanding interests have been retired (and the intrinsic worth of the then remaining outstanding interests doubled).

Third: Neither the lessee nor the Building Company (as the lessee's sole stockholder) can take one dollar out of the Cleveland Hotel or its operations until one-half of the now outstanding interests have been retired.

It is submitted that it is completely clear that no other prospective lessee of the Cleveland Hotel would be willing to make a lease on terms as favorable to the Trustee as are proposed in the Cleveland Hotel Plan. By an unlimited participation in one-half of the net earnings of the Cleveland Hotel, the Trustee (and through it the certificate holders) are given an equitable participation in the expected prosperity of the Cleveland Hotel. The lessee cannot take one dollar out of the Cleveland Hotel or its operations until one-half of the now outstanding interests are retired; and until that event occurs, every dollar earned by the Cleveland Hotel and not applied to rent must be devoted to building up the intrinsic worth of the interests not retired. A new face, looking for a lease on the Cleveland Hotel, certainly would not be willing to give all of these advantages to the Trustee,[4] for they mean not only that the Trustee (and through it the certificate holders) share equitably in the prosperity of the Cleveland Hotel, but also that the lessee cannot hope to realize anything out of the Cleveland Hotel and its operations except and unless

[4] Compare, for example, the suggestions which a representative of the Allerton Hotels made to Mr. Hott, one of the petitioners (R. 570).

it provides a long successful operation of the hotel. If in the meantime the lease goes into default, the Trustee (and through it the certificate holders) get back the hotel and all of its furniture, equipment, inventory and other incidental property, lock, stock and barrel (including the assets which the Special Master found to be free and unpledged under the existing chattel mortgages), and have had the benefit of all of its earnings until then.

Actual experience since July 1, 1942, has demonstrated how valuable the lease provided for in the Cleveland Hotel Plan is to the Trustee and the certificate holders. The net earnings of the Cleveland Hotel for the last six months of 1942 were approximately $101,500.00 (R. 681);[5] for the year 1943 they were approximately $451,900.00 (R. 681); or a total for the eighteen months of approximately $553,400.00.[6] Of this amount approximately one-half, or $276,700.00, would go under the proposed lease to the Trustee (for the benefit of certificate holders) as additional rent. For the eighteen months, therefore, the Trustee would receive as rent for the certificate holders said sum of approximately $276,700.00 plus the fixed rent of $262,500.00 ($175,000.00 x 1.5), or a total of approximately $539,200.00, which on an annual basis would be approximately $359,400.00 (two-thirds of $539,200.00). This amount of rent of approximately $359,400.00 compares with the annual rent of $192,500.00 stipulated in the existing lease. But this is not the whole story. The lessee could not take down one dollar of the hotel net earnings for itself or the Building

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[5] The figures used in this paragraph disregard reorganization expenses which are not presently known, and possible adjustment of income tax reserves.

Also, for simplicity, we have not adjusted the additional rent figures given in this paragraph to reflect any retirement of interests at the end of 1942 out of 1942 earnings.

[6] It should be stated that the record in this case before the District Court was completed over two years ago, so that figures for 1944 and 1945 are not in the printed record.

Company, its stockholder. Under the proposed lease all of the net earnings of the hotel not paid to the Trustee as additional rent must be applied to the retirement of outstanding interests. Such application would improve substantially the intrinsic worth of the interests not retired, and at the same time would undoubtedly sustain the market price of those interests, both of which results are of great value to the certificate holders. It seems clear enough, therefore, that whether the lease provided for in the Cleveland Hotel Plan is compared with the existing lease or is considered abstractly on its own merits, it is a very favorable lease for the Trustee and the certificate holders, and a lease much more favorable to them than they could reasonably expect to negotiate with a stranger to the reorganization.

Moreover, there is very little doubt that before one-half of the presently outstanding interests are retired, and the lessee under the proposed lease can commence to take down anything out of the operations of the Cleveland Hotel, the Trustee and the certificate holders will have received cash benefits out of the net earnings of the hotel in an amount in excess of the Trustee's claim for back rent. On the average, about three-fifths of the amount devoted out of the net earnings of the Cleveland Hotel to the retirement of interests will be devoted to additional rent.[7] It is, of course, impossible to predict just how much the purchase price of one-half of the presently outstanding interests will be. However, the record indicates (R. 688) that the market price of interests in March, 1944, was 89 ($445.00 per interest) and all counsel will probably concede

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[7] At the beginning, before the retirement of any interests, the net earnings are divided equally between additional rent and the retirement of interests, or in the ratio of one to one. As the retirement of interests approaches one-half of the interests presently outstanding, the division of the net earnings between additional rent and the retirement of interests will approach the ratio of one to three. The mean ratio is, therefore, three to five.

that the present price is above 100 ($500.00 per interest). It is further probable that the price will be maintained as interests are retired. Assuming, therefore, for illustration, that one-half of the presently outstanding interests are purchased at 100 ($500.00 per interest) in the one case, and at 90 ($450.00 per interest) in the other case, the result would be as follows:

	At 100	*At 90*
Cost of 3500 interests	$1,750,000	$1,575,000
Concurrent additional rent paid to Trustee	1,050,000	945,000
Total	$2,800,000	$2,520,000

Thus it will be seen that even if one-half of the presently outstanding interests are purchased at 90, the Trustee and the certificate holders, before the lessee can take down anything out of the operations of the Cleveland Hotel, will receive as additional rent an amount approaching the Trustee's back rent claim, and in addition thereto $1,575,000.00 will have been expended in retiring interests, thereby correspondingly increasing the intrinsic worth of the interests not retired. In other words, directly and indirectly, the certificate holders will have benefited to the extent of $2,520,000.00 before the lessee can get anything. As the purchase price of the interests rises, the result will be even more favorable to the certificate holders, as shown in the foregoing table in the "At 100" column.

Under the Cleveland Hotel Plan none of the Trustee's security is passed either to the Building Company or its unsecured creditors. All of that security (and more) is pledged to the Trustee against the new Cleveland Hotel lease. Under the new lease, neither the lessee thereunder nor its stockholder, the Building Company, can realize one dollar of profit out of the hotel or its operations until the certificate holders have benefited, directly or indirectly, over and above the fixed rent, to an extent largely in excess

of the present value of the Trustee's back rent claim. As demonstrated above, the new lease is a very favorable one to the Trustee, and there is put back of the new lease property of a value in excess of $125,000.00, in or against which the Trustee has no right or claim. For whatever concession in its strict legal rights the Trustee makes in the Cleveland Hotel Plan, it is abundantly clear that the Trustee and the certificate holders receive, through the new lease, a fair *quid pro quo*. These facts are the quick answer to all of the petitioners' objections, including those which charge that the Plan recognizes an equity of the Building Company which does not exist, and gives to the Building Company an inequitable amount of stock in the new hotel company which will become the lessee of the hotel under the new lease. The Trustee did not develop the Cleveland Hotel Plan on any theory that the Building Company had any equity in the existing lease. The Plan gives recognition to the lessee in the proposed new lease only for long, successful operation of the Cleveland Hotel in the future, *and postpones that recognition until the lessee has earned it by performance resulting in very substantial benefits to the certificate holders*. If the lessee does not earn recognition by such performance, the hotel and the security for the new lease will come back to the certificate holders, and, in the meantime, they will have had the benefit, directly or indirectly, of the entire net earnings of the hotel.

As the Circuit Court of Appeals said in its opinion (R. 836; 839):

> "In our judgment, the approved plan of reorganization in the instant case conforms to the standard established in *Group of Investors, supra*, [the *Milwaukee* case], and does not conflict with the holding in the *Los Angeles Lumber Co.* case, or the principles therein declared."
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> "As has been indicated, it is our judgment that, for concession of its strict legal rights, the trustee under

the plan of reorganization of the lessee-debtor receives a fair and equitable consideration for execution of the new lease for the benefit of the beneficiaries of the trust."

The Denial of General Intervention to Petitioners.

The allowance of a general intervention to the petitioners was a matter in the District Court's discretion, and the denial by the District Court of a general intervention to the petitioners is not reviewable here. Moreover, the petitioners have not been prejudiced by the action of the District Court in denying them a general intervention.

It is conceded (Petitioners' Petition, page 8) that the allowance of a general intervention to the petitioners was a matter in the discretion of the District Court. Under Section 207 of the Bankruptcy Act, the District Court might have permitted the petitioners to intervene generally, but it was not required to do so, and it exercised its discretion against allowing to the petitioners a general intervention. That exercise of discretion is not reviewable here. The petitioners' counsel were permitted by the District Court (R. 81), and by the Circuit Court of Appeals, both on brief and by oral argument, to present fully their views on the issues here involved. They were granted as full an opportunity to be heard as if they had been allowed a general intervention. The petitioners, therefore, have not been prejudiced in any way by their failure to obtain a general intervention.

IN CONCLUSION.

It is submitted, therefore, that the petition for writ of certiorari should be denied..

JOHN T. SCOTT,
BROOKS W. MACCRACKEN,
Attorneys for Respondent,
The National City Bank of Cleveland,
Successor Trustee.